No.

IN THE
Supreme Court of the United States

MCLANE SOUTHERN, INC.,

Petitioner,

v.

CYNTHIA BRIDGES, SECRETARY OF THE DEPARTMENT OF REVENUE, STATE OF LOUISIANA,

Respondent.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commerce Clause of the United States Constitution allows States to tax goods distributed by out-of-state wholesalers more heavily than goods distributed by in-state wholesalers.

CORPORATE DISCLOSURE STATEMENT

Petitioner McLane Southern, Inc., is a wholly owned subsidiary of McLane Company, Inc., which in turn is a wholly owned subsidiary of GEICO, which in turn is a wholly owned subsidiary of Berkshire Hathaway, Inc., a publicly-traded company.

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INTRODUCTION

This petition calls upon this Court once again to fulfill its "duty to determine whether [state legislation], whatever its name may be, will in its practical operation work discrimination against interstate commerce." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (internal quotation omitted). Louisiana, like a growing number of other States, imposes an excise tax on smokeless tobacco based on the price invoiced to the first distributor to bring the product into the State. Because a product's price increases at every step of a multi-step distribution chain, it follows as a matter of law and logic that such a tax falls more heavily on products that enter the State at a later point in the distribution chain. As the foremost commentators on state taxation have observed, "it does not take a Nobel Prize-winning economist to figure out that the earlier in the economic process one triggers [such a] tax, the lower the tax." Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 4.14[3][n] (2013). And the lower the tax, the greater the competitive advantage for an in-state distributor. The Federal Constitution, however, does not tolerate such discriminatory state taxation.

This case provides a stark illustration of the problem. Petitioner McLane Southern, Inc., is a wholesaler that sells smokeless tobacco to Louisiana retailers from a distribution center in Brookhaven, Mississippi. A competitor, Imperial Trading Co., sells the same product to the same such retailers from inside Louisiana. Because the amount of the excise tax depends on the price invoiced to the first entity to bring the product into the State, and the

smokeless tobacco sold by Imperial enters Louisiana one stage earlier in the distribution process, that tobacco is subject to a lesser tax than the tobacco sold by McLane. The system thereby gives Imperial a competitive advantage, because it can sell smokeless tobacco to Louisiana retailers at a lower price that reflects the lower tax.

Nonetheless, the state court below—like state courts in Colorado and Minnesota that have considered similar state tax laws—upheld the Louisiana law under the Commerce Clause. The court freely acknowledged that the law "has the effect of increasing the amount of the tobacco tax" on goods sold by out-of-state distributors, thereby placing those goods "at a competitive disadvantage in the marketplace," but asserted that this point is constitutionally irrelevant. According to the court, the tax does not violate the Commerce Clause because it "is assessed at the same rate … regardless of where the products originate."

That assertion reveals a fundamental misunderstanding of the law. The amount of a tax depends not only on the tax *rate*, but also on the tax *base* to which that rate is applied. Thus, it makes no sense to condemn laws that discriminate against out-of-state businesses with respect to the tax rate, but not to condemn laws that discriminate against out-of-state businesses with respect to the tax base. Whether through discrimination in the tax rate or the tax base, laws that subject products sold by out-of-state businesses to higher taxes than the same products sold by in-state businesses give the latter a competitive advantage, and thus threaten our national economic union. Although the Framers may

have been unfamiliar with modern-day smokeless-tobacco distribution, they were all too familiar with the States' natural tendency to benefit in-state businesses by burdening their out-of-state competitors. That is why the Commerce Clause gives the Federal Government authority to regulate commerce among the States and prevents States from discriminating between in-state and out-of-state businesses. And that is why this Court, for almost two centuries, has not hesitated to strike down discriminatory state legislation.

The need for this Court's vigilance is particularly acute in the context of state taxation because the Tax Injunction Act withdraws jurisdiction from the lower federal courts to entertain challenges to state tax laws. Thus, such disputes can arise *only* in the state courts, and this is the *only* federal court with the power to review the constitutionality of such laws. It is therefore hardly surprising that this Court often grants review to invalidate discriminatory state tax laws even when the state courts have uniformly upheld the constitutionality of such laws.

Accordingly, this Court should grant review here to consider the constitutionality of state excise taxes that shift the tax base depending on the stage in the distribution process at which a product crosses state lines. Such taxes inherently discriminate against out-of-state wholesalers, but the state courts have thus far failed to discharge their obligation to invalidate such taxes under the Commerce Clause. And because, with the blessing of the state courts, such discriminatory taxes are spreading quickly, this Court's review of this important and recurring issue is warranted.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal, First Circuit, is published at 110 So. 3d 1262 and reprinted in the Appendix ("App.") at 1-18a. The unpublished order of the Supreme Court of Louisiana denying McLane's subsequent petition for writ of certiorari is reprinted at App. 19a. The unpublished amended final judgment of the trial court denying McLane relief is reprinted at App. 20-22a.

JURISDICTION

The Louisiana Court of Appeal, First Circuit, rendered its decision on March 21, 2013. App. 1a. McLane timely filed a petition for a writ of certiorari in the Supreme Court of Louisiana, which was denied on August 30, 2013. App. 19a. McLane invokes this Court's jurisdiction under 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the U.S. Constitution provides, in relevant part: "The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

La. Rev. Stat. Ann. § 47:841 provides in relevant part:

> There is hereby levied a tax upon the sale, use, consumption, handling, or distribution of all cigars, cigarettes, and smoking and smokeless tobacco, as defined herein within the state of Louisiana, according to the classification and rates hereinafter set forth:

* * *

> E. Smokeless Tobacco. Upon smokeless tobacco, a tax of twenty percent of the invoice price as defined in this Chapter.

La. Rev. Stat. Ann. § 47:842 provides in relevant part:

> As used in this Chapter, the following terms have the meaning ascribed to them in this Section, unless the context clearly indicates otherwise:
>
> * * *
>
> "Invoice price" [is] the manufacturer[']s net invoiced price as invoiced to the Louisiana tobacco dealer, by the manufacturer, jobber, or other persons engaged in selling tobacco products in accordance with the tax levied by this chapter.

La. Rev. Stat. Ann. § 47:854 provides in relevant part:

> A. It is the intent and purpose of this Chapter to levy an excise tax on all cigars, cigarettes and smoking tobacco, as defined in this Chapter, sold, used, consumed, handled or distributed in this state, except as provided in R.S. 47:855 and to collect same from the dealer who first sells, uses, consumes, handles or distributes the same in the state of Louisiana.

STATEMENT OF THE CASE

A. Background

Petitioner McLane Southern, Inc., is a wholesaler of grocery products, including smokeless tobacco. As relevant here, McLane purchases smokeless tobacco

from U.S. Smokeless Tobacco Brands, Inc. (UST-Sales), a distributor that buys the product from an affiliated manufacturer, U.S. Smokeless Tobacco Manufacturing Company LLC (UST-Manufacturing). App. 6a. It is undisputed that UST-Sales invoices the product to McLane for an amount greater than the amount invoiced to UST-Sales itself by UST-Manufacturing; like any rational economic actor, UST-Sales "marks up" the price to account for its distribution services. App. 7a. After buying the smokeless tobacco from UST-Sales, McLane resells it to retail stores located throughout the southeastern United States, including in Louisiana, from a distribution center in Brookhaven, Mississippi. *Id.*

When McLane sells smokeless tobacco to its retail customers in Louisiana, the company becomes liable for an excise tax. Smokeless tobacco products are taxed at the rate of "twenty percent of the invoice price." La. Rev. Stat. Ann. § 47:841(E). The law defines "invoice price" as "the manufacturer[']s net invoiced price as invoiced to the Louisiana tobacco dealer, by the manufacturer, jobber, or other persons engaged in selling tobacco products." *Id.* § 47:842. And the law further defines the Louisiana tobacco dealer subject to the tax as "the dealer who *first* sells, uses, consumes, handles or distributes" smokeless tobacco in the State. *Id.* § 47:854 (emphasis added).

The upshot of this scheme, as interpreted by the Louisiana Department of Revenue and confirmed by the state courts below, is that the 20% excise tax must be paid by the first distributor to sell smokeless tobacco in Louisiana, based on the price invoiced to that particular distributor, rather than the uniform

manufacturer's price. As applied to this case, that meant that Louisiana collected the tax from McLane at the rate of 20% of the price that UST-Sales invoiced to McLane for the smokeless tobacco. App. 7a.

B. Proceedings Below

After paying the Louisiana tax under protest for several years, McLane filed a petition for refund in Louisiana state court in December 2006 challenging the tax on both state statutory and federal constitutional grounds. The trial court (Fields, J.) summarily rejected the challenge. *See* App. 20-22a.

The Louisiana Court of Appeal initially reversed, holding that the statute did not apply to the smokeless tobacco distributed by McLane. *See McLane Southern, Inc. v. Bridges*, 64 So. 3d 886 (La. Ct. App. 2011) (Pettigrew, J.). The Louisiana Supreme Court, however, reversed that holding, and remanded the case for the Court of Appeal to consider McLane's alternative statutory and constitutional arguments. *See McLane Southern, Inc. v. Bridges*, 84 So. 3d 479 (La. 2012) (Victory, J.).

On remand, the Court of Appeal (Pettigrew, J.) rejected McLane's alternative arguments and affirmed the judgment in favor of the Louisiana Department of Revenue. The court first rejected McLane's statutory argument that the tax should be based on the "manufacturer[']s net invoiced price," La. Rev. Stat. § 47:842, agreeing with the Department that, notwithstanding that statutory language, the tax should be based on the price invoiced to the first dealer to send smokeless tobacco into the State, *see* App. 6-8a. One judge dissented on this ground, noting that the majority's interpretation

rendered superfluous the statutory reference to the "manufacturer[']s net invoiced price" as the basis for the tax. App. 16-18a (Kuhn, J., dissenting).

The court then proceeded to reject McLane's argument that, as thus construed, the statute violates the Commerce Clause. *See* App. 8-15a. The court acknowledged, as had earlier decisions from Colorado and Minnesota involving similar statutes, that the statute places products sold by out-of-state distributors at a "'competitive disadvantage'" with respect to products sold by in-state distributors, because the tax falls more heavily on the former. App. 11a (quoting *McLane Western, Inc. v. Dep't of Revenue*, 126 P.3d 211, 216 (Colo. App. 2005)); *see also* App. 11-12a ("'McLane is correct that calculating the tobacco tax using the price that McLane pays to UST-Sales, instead of the amount that UST-Sales pays to UST-Manufacturing, has the effect of increasing the amount of the tobacco tax that it pays as the tax-liable distributor.'") (quoting *McLane Minn., Inc. v. Commissioner of Revenue*, 773 N.W.2d 289, 299 (Minn. 2009); brackets omitted).

Nonetheless, the court concluded that the tax did not violate the Commerce Clause because "the tax is assessed at the same *rate* … regardless of where the products originate." App. 14a (emphasis added; internal citation omitted). The court did not, and could not, deny that this uniform rate was applied to a different tax *base*, but asserted that "McLane's increased tax obligation in the instant case is 'not the result of a tax that discriminates against out-of-state products or favors in-state products,' but rather due to the change in pricing by McLane's supplier, UST-Sales." App. 15a (quoting *McLane Minn.*, 773

N.W.2d at 300). "'It is UST-Sales' business model, and not the statutory structure, that causes McLane's higher tax obligation. The Commerce Clause does not protect "particular structure[s] or methods of operation in a retail market."'" *Id.* (quoting *McLane Minn.*, 773 N.W.2d at 300; brackets omitted).

The Louisiana Court of Appeal denied a timely petition for rehearing, and the Louisiana Supreme Court denied a timely petition for discretionary review. *See* App. 19a.

This petition follows.

REASON FOR GRANTING THE WRIT

The Commerce Clause Does Not Allow States To Tax Goods Distributed By Out-Of-State Wholesalers More Heavily Than Goods Distributed By In-State Wholesalers.

This Court should grant review because the decision below upholds a state tax that concededly puts out-of-state wholesalers at a competitive disadvantage with respect to their in-state competitors in manifest violation of the Commerce Clause. That provision on its face grants Congress the "Power ... To regulate Commerce ... among the several States," U.S. Const., Art. I, § 8, cl. 3, but "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 98 (1994); *accord Granholm v. Heald*, 544 U.S. 460, 472 (2005); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977).

This "negative" aspect of the Commerce Clause applies with full force to state tax laws that discriminate against interstate commerce. *See, e.g.*, *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330-47 (1996); *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 649 (1994); *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269 (1984); *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). "A State's 'power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against interstate commerce.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 574-75 (1997) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923); brackets omitted); *see also id.* at 621-40 (Thomas, J., joined by Scalia, J., dissenting) (agreeing that the Federal Constitution prohibits state taxes that discriminate against interstate commerce, but suggesting that such prohibition flows from the Import-Export Clause, U.S. Const., Art. I, § 10, cl. 2).

This anti-discrimination principle, as this Court has explained, is "essential to the foundations of the Union." *Granholm*, 544 U.S. at 472. The States' natural tendency to promote in-state over out-of-state business interests presents a constant threat to our national unity. Strict enforcement of the anti-discrimination principle is thus necessary to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). Thus, "[t]ime and time again, this

Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm*, 544 U.S. at 472 (internal quotation omitted).

The Louisiana tax scheme at issue here violates this fundamental principle. By applying a uniform tax rate to a shifting tax base—the price invoiced to the entity that first sends smokeless tobacco into the State—Louisiana necessarily imposes a higher tax on smokeless tobacco sold through a distribution chain with more links outside the State. As a function of basic and predictable market forces, the price of a good increases as it moves through each successive link in a distribution chain. *See, e.g.*, Vincent DiLorenzo & Clifford R. Ennico, *Basic Legal Transactions* § 19A:3 (2011) ("A distributor … purchases goods from a company at a discounted or wholesale price, and then resells the goods at a higher price, either directly to the consumer or to a retail outlet (which in turn sells to consumers at an even higher markup)."). It follows that the tax burden under the Louisiana statute is at its lowest when the entire distribution chain is located in-state. And, conversely, the tax burden is at its highest when the entire distribution chain before retail is located out-of-state.

None of this is disputed; to the contrary, the court below, as well as other state courts that have addressed this issue, freely conceded the point. "'McLane is correct that calculating the tobacco tax using the price that McLane pays to UST-Sales,

instead of the amount that UST-Sales pays to UST-Manufacturing, has the effect of increasing the amount of the tobacco tax that it pays as the tax-liable distributor.'" App. 11-12a (quoting *McLane Minn.*, 773 N.W.2d at 299; brackets omitted); *see also* App. 11a (acknowledging "'[t]he fact that the tax base calculated on the price paid by the taxable distributor may place the product at a competitive disadvantage in the marketplace because the higher tax is added to the price.'") (quoting *McLane Western*, 126 P.3d at 216); *McLane Western*, 126 P.3d at 215 ("[T]he tax base will be higher the later in the distribution network the product is taxed.").

Because there is no dispute that this system taxes products distributed by out-of-state wholesalers more heavily than the same products distributed by in-state wholesalers, the only question is whether such differential taxation makes any constitutional difference. Contrary to the conclusion of the Louisiana, Minnesota, and Colorado courts, the answer to that question is yes. "The commerce clause forbids discrimination, whether forthright or ingenious." *West Lynn Creamery*, 512 U.S. at 201 (internal quotation omitted). State taxes that fall more heavily on products sold by out-of-state businesses thus violate the Clause. *See*, *e.g.*, *Scheiner*, 483 U.S. at 280-98; *Nippert v. Richmond*, 327 U.S. 416, 430-35 (1946). In particular, "the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents." *Scheiner*, 483 U.S. at 282.

It follows that state excise taxes based on the price invoiced to the first entity to ship the product

into a State, like the tax at issue here, cannot be sustained. Because such statutes apply a uniform rate of taxation to a shifting tax base, they necessarily increase the tax burden on out-of-state distributors. For this reason, the leading commentators on state taxation have condemned such statutes as unconstitutional. *See* Hellerstein & Hellerstein, *State Taxation* ¶ 4.14[3][n]. As these commentators have noted, the suggestion that such statutes do not pressure companies to move their distribution facilities in-state "rings hollow." *Id*. "How can a business that conducts its 'upstream' [smokeless tobacco] operations outside of [such a taxing State] and sells [smokeless tobacco] into [that State] not feel 'pressure' to move those operations into [that State] to lower the tax (and, presumably, the price) at which its [smokeless tobacco] is sold 'downstream' in [that State]?" *Id.* The court below, like the Minnesota and Colorado courts before it, "never provides a satisfactory answer to this fundamental question." *Id.*

And, as explained above, the discrimination here is real. It is undisputed on this record that McLane competes in Louisiana with an in-state wholesaler, Imperial. Both McLane and Imperial buy their smokeless tobacco from UST-Sales. Simply because Imperial is located in Louisiana while McLane is not, the smokeless tobacco that Imperial sells to Louisiana retailers is subject to a lesser tax. Such tobacco, after all, is subject to tax at 20% of the price invoiced to UST-Sales (the first dealer to send the tobacco into Louisiana) by UST-Manufacturing. The tobacco sold by McLane, in contrast, is subject to tax at 20% of the price invoiced to McLane (the first dealer to send that tobacco into Louisiana) by UST-

Sales. It is also undisputed, as the court below acknowledged, that the price invoiced to UST-Sales by UST-Manufacturing is lower than the price invoiced to McLane by UST-Sales. *See* App. 11-12a. It follows that the Louisiana statute puts McLane at a competitive disadvantage with respect to Imperial, because Imperial can pass along tax savings to its customers in the form of lower prices.

The Louisiana tax challenged here thus operates much like the Louisiana tax invalidated by this Court on Commerce Clause grounds fully half a century ago in *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). The statute at issue there taxed both goods sold in Louisiana and goods sold outside Louisiana but brought into the State for use there at a uniform rate of 2%. *See id.* at 65-67. As in this case, however, that uniform tax rate was applied to a shifting tax base: whereas goods sold in Louisiana were taxed based on their sales price (which did *not* include labor and service costs), goods sold outside the State were taxed based on their "cost price" (which *did* include labor and service costs). *See id.* at 67. This Court struck down the statute as unconstitutionally discriminatory: although the tax rate was uniform, the shifting tax base led to "inequality" of taxation, as the "tax base is increased" for out-of-state businesses. *Id.* at 70; *see also Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 76 (1989) (noting that *Halliburton* involved a "Louisiana statute [that] had the discriminatory effect of imposing a greater tax on the same goods if they were manufactured outside Louisiana than if they were manufactured within the State, thereby creating the incentive to locate the manufacturing process within the State").

The same is true here. Because each link in a distribution chain adds to a product's price, a tax based on the price invoiced to the first distributor to sell the product within a State will necessarily fall more heavily on goods that enter the State later in the distribution process. Thus, as explained above, smokeless tobacco sold by McLane to Louisiana retailers would be subject to a lesser tax if McLane moved its distribution center across the Mississippi River from Mississippi to Louisiana. In essence, Louisiana is taxing McLane for the value that UST-Sales added to the product while exempting in-state distributors from any such tax. The application of this shifting tax base in such a discriminatory manner violates the Commerce Clause. *See Halliburton*, 373 U.S. at 69-75; *see also South Cent. Bell*, 526 U.S. at 169 (shifting tax base, where amount included within tax base depends on in-state location, violates Commerce Clause).

The court below offered three justifications for its contrary conclusion, but none withstands scrutiny.

First, the court asserted that the Louisiana excise tax "is assessed at the same rate … regardless of where the products originate." App. 14a (internal quotation omitted). That assertion, however, proves nothing. Focusing on the tax's neutral feature—its uniform rate—does not excuse ignoring its discriminatory feature—the shifting base to which that rate is applied. A tax with a neutral rate applied to a non-neutral base violates the Commerce Clause just as much as a tax with a non-neutral rate. *See, e.g.*, *South Cent. Bell*, 526 U.S. at 169; *Halliburton*, 373 U.S. at 71-74.

Second, the court asserted that the tax is uniformly "assessed against the first dealer who causes tobacco products to be in Louisiana for sale or distribution." App. 14a (internal quotation omitted). Once again, that assertion proves nothing. A State certainly may collect an excise tax from the first link in a distribution chain to bring a product within its borders. But that does not mean that a State may apply a shifting tax base in calculating that tax. Whether the State can collect the tax from a particular entity has nothing to do with the base on which the State calculates the tax. And the lesson of *Halliburton* and this Court's other Commerce Clause cases is that States cannot use a shifting tax base that favors in-state over out-of-state businesses.

And *third*, the court asserted that the discriminatory taxation here was the result of pricing decisions "by McLane's supplier, UST-Sales." App. 15a (internal quotation omitted). Yet again, that assertion is baseless. Because, as noted above, every link in a distribution chain will increase a good's price, the Louisiana tax will invariably fall more heavily on goods with more out-of-state links in their distribution chains. Louisiana cannot justify a statute that yields discriminatory effects as a result of basic and predictable market forces by simply blaming the market forces instead of the statute. Although it is theoretically true that the statute would not result in discrimination if UST-Sales charged its customers the same price as UST-Manufacturing charged UST-Sales, it is no defense to a constitutional challenge to suggest that the unconstitutionality would vanish if private parties simply altered their primary conduct. *See, e.g.*, *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2477-

78 (2013). Just as Louisiana could not defend the discriminatory tax by arguing that McLane could avoid the discrimination by simply getting out of the smokeless tobacco business altogether, Louisiana cannot defend the tax by arguing that UST-Sales could alter its underlying business practices.

Unfortunately, the Louisiana tax at issue here is not an anomaly. Twenty other States have taxes that, like Louisiana's, apply to the entity that first buys or sells smokeless tobacco in the State, based on the price invoiced to that entity.[1] And, as state courts have upheld such statutes against Commerce Clause challenges, their number has only increased.

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[1] *See* Ark. Code Ann. § 26-57-208; Cal. Rev & Tax Code §§ 30011, 30017, 30123; Conn. Gen. Stat. §§ 12-330a, 12-330c; Ga. Code Ann. § 48-11-2; Idaho Code Ann. §§ 63-2551, 63-2552, 63-2552A; Mass. Gen. Laws ch. 64C, §§ 6, 7A, 7B, 7C; Md. Code Ann., Tax-General §§ 12-101, 12-102, 12-105, 12-302; N.H. Rev. Stat. Ann. §§ 78:1, 78:7-c; Nev. Rev. Stat. §§ 370.440, 370.450; N.M. Stat. Ann. §§ 7-12A-2, 7-12A-3; N.C. Gen. Stat. §§ 105-113.4, 105-113.35; Ohio Rev. Code Ann. §§ 5743.01, 5743.51; Or. Rev. Stat. §§ 323.500, 323.505; R.I. Gen. Laws § 44-20-13.2; Tenn. Code Ann. §§ 67-4-1001, 67-4-1002, 67-4-1005; Va. Code Ann. §§ 58.1-1021.01, 58.1-1021.02; Wash. Rev. Code §§ 82.26.010, 82.26.020, 82.26.030; W. Va. Code §§ 11-17-2, 11-17-3; *see also McLane Western*, 126 P.3d at 213-14 (construing Colo. Rev. Stat. §§ 39-28.5-101, 39-28.5-102); *McLane Minn.,* 773 N.W.2d at 294 (construing Minn. Stat. Ann. §§ 297F.01, 297F.05).

Indeed, since this Court declined to review a Colorado decision upholding a similar Colorado tax on smokeless tobacco, *see McLane Western*, 549 U.S. 810 (2006) (order denying certiorari), three other States explicitly amended their statutes to follow the Colorado model. *See* 2013 Nev. Legis. 47 (amending the definition of "wholesale price" from "the established price for which a *manufacturer* sells a product made from tobacco" to "the established price for which a product made from tobacco ... is sold") (emphasis added); 2013 Arkansas Laws Act 631 (S.B. 540) (amending its tobacco statutes to impose the excise tax based on the "invoice price," which it defines as "the price that a wholesaler or retailer of tobacco products pays to a manufacturer, importer, or distributor for tobacco products that the wholesaler or retailer subsequently sells in the state"); 2011 Idaho Laws Ch. 2 (H.B. 7) (altering definition of "wholesale sales price" from "the established price for which *a manufacturer* sells a tobacco product to a distributor ..." to "the established price for which *a manufacturer or any person* sells a tobacco product to a distributor ...") (emphasis added). In the absence of this Court's review of this issue, accordingly, the States are creating "'a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.'" *Granholm*, 544 U.S. at 473 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

Nor can there be any suggestion that regimes like Louisiana's are somehow necessary. To the contrary, there are many other ways in which States can and do impose excise taxes without discriminating against out-of-state businesses. Five States, as well as the United States and the District of Columbia,

calculate their excise taxes on smokeless tobacco based on the product's weight.[2] Nineteen other States calculate such taxes based on the price at which the manufacturer first sells the product.[3] (As noted above, the Louisiana statute at issue here by its terms bases the tax on the "manufacturer[']s net invoiced price," but was construed by the state court below to base the tax on the price invoiced to the first dealer to send the product into the State. *See* App. 6-8a.) And three other States base their tax on the price of the products as sold to retailers, which sets

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[2] *See* Ala. Code § 40-25-2; Ariz. Rev. Stat. Ann. §§ 42-3052, 42-3251, 42-3251.01, 42-3251.02; Me. Rev. Stat. tit. 36, § 4403; N.D. Cent. Code § 57-36-25; Tex. Tax Code Ann. § 155.0211; *see also* 26 U.S.C. § 5701(e); D.C. Code §§ 47-2002, 47-2402.01.

[3] *See* Alaska Stat. §§ 43.50.300, 43.50.390; Del. Code Ann. tit. 30, § 5305; Fla. Stat. §§ 210.25, 210.30; 35 Ill. Comp. Stat. §§ 143/10-5, 143/10-10; Ind. Code §§ 6-7-2-6, 6-7-2-7; Iowa Code §§ 453A.42, 453A.43; Kan. Stat. Ann. §§ 79-3301, 79-3371; Mich. Comp. Laws §§ 205.422, 205.427; Miss. Code Ann. §§ 27-69-3, 27-69-13; Mo. Rev. Stat. §§ 149.011, 149.160; Mont. Code Ann. §§ 16-11-102, 16-11-111; N.J. Stat. Ann. §§ 54:40B-2, 54:40B-3; N.Y. Tax Law §§ 470, 471-b; 68 Okla. Stat. Ann. §§ 401, 402, 402-1, 402-3; S.C. Code Ann. § 12-21-620; S.D. Codified Laws § 10-50-61; Utah Code Ann. § 59-14-302; Wis. Stat. §§ 139.75, 139.76; Wyo. Stat. Ann. §§ 39-18-101, 39-18-103, 39-18-104.

the tax at the same point in the distribution chain.[4] All of these methods apply a uniform tax rate to a uniform tax base, and thereby serve the States' interest in taxation without giving in-state businesses an unconstitutional competitive advantage over out-of-state businesses.

In the absence of this Court's review, however, these non-discriminating jurisdictions will have even less reason to play by the rules, and may not be able to afford to do so. If some States are enacting laws like Louisiana's that give in-state businesses a competitive advantage, other States will feel pressured to follow course to prevent such discriminatory laws from luring away their businesses. Only this Court's review will stop such a "race to the bottom" among the States—precisely the negative dynamic that the Commerce Clause was intended to forestall.

Nor is the concern here limited to smokeless tobacco taxes. Although the Louisiana excise tax at issue here applies to such products, this method of taxation could easily apply to other products. For example, most States impose excise taxes on fuel, alcohol, and cigarettes based on a fixed standard (*e.g.*, weight). *See, e.g.*, Ala. Code §§ 40-17-325, 40-17-326(b); Colo. Rev. Stat. § 39-27-102; Ohio Rev. Code Ann. § 5735.05; N.C. Gen. Stat. §§ 105-113.80, 105-449.80, 105-449.81; Tex. Tax Code Ann. §§ 162.101(b), 162.102. Needless to say, such States

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[4] *See* Haw. Rev. Stat. §§ 245-1, 245-7; Ky. Rev. Stat. Ann. § 138.140; Vt. Stat. Ann. Tit. 32, §§ 7702, 7811, 7812.

could easily switch course and apply Louisiana's tax structure by establishing a shifting tax base that will incentivize businesses to move their distribution operations in-state. In the absence of this Court's review, such States now have every incentive to do just that.

Nor is there any reason to await further percolation of the issue in the lower courts. By definition, this issue can arise only in the state courts. The Tax Injunction Act of 1937 strips the lower federal courts of jurisdiction over cases seeking to restrain the collection of state taxes: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. This statute has been interpreted to bar actions for refund, *Marvin F. Poer & Co. v. Counties of Alameda*, 725 F.2d 1234, 1236 (9th Cir. 1984); *Cities Serv. Gas Co. v. Oklahoma Tax Comm'n*, 656 F.2d 584, 586 (10th Cir. 1981); *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323, 327 n.5 (5th Cir. 1979), including actions for declaratory judgments, *see California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982). And even in the absence of that statute, this Court has held that "the comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 417 (2010). Thus, by definition this is the only federal court that can consider the constitutional claim presented here, and there can be no split of authority on this issue among the lower federal courts.

Presumably for this reason, this Court typically does not await a split among the state courts before granting review to consider a Commerce Clause challenge to a discriminatory state tax. To the contrary, most of this Court's recent cases in this area did not involve any such split. *See, e.g.*, *South Cent. Bell*, 526 U.S. 160; *Fulton*, 516 U.S. 325; *Associated Indus. of Mo.*, 511 U.S. 641. Further delay in addressing this issue will only exacerbate the practical problems associated with an eventual ruling invalidating such discriminatory taxes as unconstitutional. As this Court has made clear, the appropriate remedy under those circumstances is a refund of such taxes, even though the state governments may already have collected, appropriated, and spent the money. *See, e.g.*, *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94-97 (1993).

Accordingly, this Court should grant this petition. The decision below approves a tax that concededly falls more heavily on products sold through out-of-state distribution channels, in conflict with the cardinal anti-discrimination principle embodied in the Commerce Clause. Because this discriminatory tax distorts the interstate market and presents issues of national importance involving laws in many States, this Court's review is warranted.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

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